IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-751

ANIBAL SOTTO and JOAQUIN A. AMOR,
Petitioners,

versus

LOUIE L. WAINWRIGHT,
Secretary, Department of Offender Rehabilitation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, ANIBAL SOTTO and JOAQUIN A. AMOR, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on the 28th day of September, 1979.

OPINION BELOW

The full opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix A. The reported opinion appears at 601 F.2d 184 (5th Cir. 1979).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. That judgment and opinion was entered on August 22, 1979. (App. A, B). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 28, 1979. (App. C). The mandate of the court was stayed until November 11, 1979, or alternatively, pending disposition of a timely filed petition for writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER IT IS FUNDAMENTALLY UNFAIR TO DENY A DESERVING STATE PRISONER THE BENEFIT OF AN ORDER GRANTING MITIGATION OF HIS SENTENCE BECAUSE THE ORDER WAS NOT ENTERED WITHIN THE TIME PRESCRIBED BY A RULE OF CRIMINAL PROCEDURE, WHERE THAT DELAY IN RULING WAS ENTIRELY WITHOUT THE FAULT OF THE PRISONER.

2. WHETHER A STATE PRISONER IS DENIED HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO ACCESS TO THE COURTS WHERE, DUE SOLELY TO THE COURT'S INABILITY TO TIMELY RULE ON HIS TIMELY FILED MOTION TO MITIGATE, HE IS PRECLUDED FROM RECEIVING ANY JUDICIAL REVIEW OF HIS MOTION AT ALL.

3. WHETHER THE DISPARATE TREATMENT OF A PRISONER WHO IS FORTUNATE ENOUGH TO BE ABLE TO OBTAIN A PROMPT COURT RULING ON HIS MOTION TO MITIGATE AND A PRISONER WHO IS DENIED A TIMELY RULING DUE TO THE COURT'S INCAPACITY, ABSENCE OR PREOCCUPATION, DENIES TO THE LATTER HIS CONSTITUTIONAL PROMISE OF EQUAL PROTECTION OF THE LAW.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law.

Amendment XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Rule of Criminal Procedure 3.800(b)

A court may reduce a legal sentence imposed by it within sixty days after such imposition, or within sixty days after receipt by the court of a mandate issued by the appellate court upon affirmance of the judgment and/or sentence upon an original appeal, or within sixty days after receipt by the court of a certified copy of an order of the appellate court dismissing an original appeal from the judgment and/or sentence, or, if further appellate review is sought in a higher court or in successively higher courts, then within sixty days after the highest state or federal court to which a timely appeal has been taken under authority of law, or in which a petition for certiorari has been timely filed under authority of law, has entered an order of affirmance or an order dismissing the appeal and/or denying certiorari.

STATEMENT OF THE CASE

The petitioners, ANIBAL SOTTO and JOAQUIN A. AMOR, were tried for various lottery offenses before the Honorable George E. Orr at a time when Judge Orr

was sitting in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The petitioners were adjudged guilty and each sentenced to a prison sentence of three years plus fines. [App. A, p. 2a].

Pursuant to the petitioners' convictions, an appeal was taken to the District Court of Appeal, Third District, and a mandate affirming the judgment and sentence was returned on February 13, 1976. *Sotto v. State*, 325 So.2d 414 (Fla. 3d DCA 1976). Thereafter, the petitioners petitioned for certiorari in the Florida Supreme Court, which petition was denied on July 30, 1976. *Sotto v. State*, 336 So.2d 1184 (Fla. 1976).

A motion to mitigate was timely filed on behalf of the petitioners on September 23, 1976, and a hearing set for September 29, 1976. [App. A, p. 3a].

At the time of the hearing, Judge Orr had been transferred from the Criminal Division of the Circuit Court to the General Jurisdiction Division and the Honorable Paul Baker had been reassigned from the General Jurisdiction Division to the Criminal Division and had assumed Judge Orr's caseload.

At the hearing, a question arose as to whether the motion to mitigate should be heard before Judge Baker or referred to Judge Orr. Thereupon, a recess was taken and Judge Baker communicated telephonically

with Chief Judge Grady L. Crawford, who directed that Judge Baker review the case file, testimony, if available, and the pre-sentence investigation [App. A, p. 4a].

The case file and pre-sentence investigation were ordered by the court and the matter reset for November 22, 1976. On that date, the pre-sentence investigation was not before the court and the court ordered counsel to present a transcript of the trial for review before considering the motion to mitigate. The court reset the matter for November 24, 1976. [App. A, p. 4a].

On November 24, 1976, the pre-sentence investigation was still not before the court and the transcript of the trial had not yet been delivered. The court reset the matter for December 7, 1976. On approximately November 29, 1976, the transcript of the trial was delivered to the court, which transcript consisted of 627 pages including exhibits. The court reviewed that transcript.

On December 7, 1976, the pre-sentence investigation was delivered to the court by Mr. Phillip Ware, the District Supervisor of the Department of Rehabilitative Services (Parole and Probation Department).

On the very same day the court received, for the first time, the pre-sentence investigation that was required to be reviewed in order to rule on the petitioners' motion to mitigate, the court entered its order granting the petitioners' motions to mitigate. On the basis of

the recommendations expressed in the pre-sentence investigation report, the court ordered the vacation of petitioner Sotto's prison sentence, placed him on probation for five years, and ordered the payment of a five thousand dollar fine. As to petitioner Amor, the court vacated the three year prison sentence imposed and ordered him to serve one year in the County Jail.[1] [App. A, p. 5a].

In its order, the court expressly found that:

> For the above and foregoing reasons, this Court was unable to rule within the sixty (60) days provided for in Rule 3.800, Rules of Criminal Procedure. This Court is not unmindful of the provisions of *State v. Evans*, 225 So.2d 548; however, the circumstances in the instant case differ inasmuch as the pre-sentence investigation had been misplaced and the trial transcript had to be obtained from the District Court of Appeal and then reviewed before the Court could make an intelligent ruling.

The State argues that regardless of the delay or what may have caused it the Court lost jurisdiction to consider the motion to miti-

1 Inasmuch as the court *vacated* the petitioners' original sentences rather than *reducing* their sentences, petitioners concede that the court's order is erroneous and that this cause should be remanded for the entry of an appropriately worded order. Fla.R.Crim.P. 3.800(b).

gate on December 7, 1976. This Court reasoned that the defendants should not be prejudiced because of a delay over which they had no control. It was not the fault of the defendants that the pre-sentence investigation was misplaced nor was it their fault that the Court had to consider a lengthy transcript. Prior to ruling, the Court considered these exceptional circumstances and proceeded to hear argument on the motion to mitigate.

[App. A, p. 5a, FN. 2].

From the trial court's order granting the petitioners' motion, the State petitioned the District Court of Appeal, Third District, for a writ of certiorari. The District Court, on July 26, 1977, granted the writ and vacated the trial court's order granting mitigation.

The Court held:

> The law is clear that a trial court pursuant to Fla.R.Crim.P. 3.800(b) may reduce a legal sentence at any time within sixty days after the imposition of sentence or within sixty days after the highest state or federal court, to which a timely appeal or petition for writ of certiorari has been taken, has entered an order of affirmance, an order dismissing the appeal or an order denying certiorari. A trial court lacks the jurisdiction to mitigate a legal sentence after the above sixty day periods have

> elapsed or to mitigate a legal sentence by vacating it and placing the defendant on probation. *Moss v. State*, 330 So.2d 742 (Fla. 1st DCA 1976); *State v. Rodriguez*, 326 So.2d 245 (Fla. 3d DCA 1976); *State v. Brown*, 308 So.2d 655 (Fla. 1st DCA 1975); *Smith v. State*, 289 So.2d 410 (Fla. 4th DCA 1972); *Ware v. State*, 231 So.2d 872 (Fla. 3d DCA 1970); *Jefferson v. State*, 320 So.2d 827 (Fla. 4th DCA 1975); *State v. Evans*, 225 So.2d 548 (Fla. 3d DCA 1969); cert. den. 229 So.2d 261 (Fla. 1969); cert. den. 397 U.S. 1053 (1970).
>
> The orders under review are quashed because the trial court lacked jurisdiction to enter them. The sixty day time periods under Fla.R.Crim.P. 3.800(b) had elapsed at the time the mitigation orders were entered. Since this is a jurisdictional matter, we must of necessity reject the defendants' contentions which seek to excuse the trial court's delay in mitigating the sentences.

[App. A, p. 6a].

The petitioners' petition for rehearing was denied on September 8, 1977. [App. A, p. 6a].

The petitioners then petitioned the Florida Supreme Court for a Writ of Certiorari and reinstatement of the order granting mitigation due to the fact that the

court's delay in ruling on the Motion to Mitigate was entirely unavoidable and in no way attributable to either petitioner.

The petitioners asserted that in finding that the petitioners were bound by the sixty day limitation of Rule 3.800(b), despite the fact that any delay past the sixty day limit was conclusively found by the trial court not to be the fault of the petitioners, the District Court had misapplied the principle of law established in each of the cases upon which it had relied.

The Florida Supreme Court denied the petition for lack of certiorari jurisdiction on May 8, 1978, with three of seven Justices dissenting. *Sotto v. State*, 359 So.2d 1219 (Fla. 1978).

Thereafter, on August 16, 1978, the petitioners sought habeas corpus relief in the United States District Court for the Southern District of Florida. [App. A, p. 6a].

The United States Magistrate filed a report on November 3, 1978, which recommended that the District Court allow the state trial court a reasonable time within which to enter its order upon the petitioners' motions for reduction of sentence or the writ should issue. On November 16, 1978, the District Court entered its order approving the report of the United States Magistrate and granting the habeas corpus relief sought. [App. A, p. 7a].

The respondent then appealed to the United States Court of Appeals for the Fifth Circuit. On August 22, 1979, the court reversed the grant of habeas corpus relief. [App. A]. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by petitioners. This petition was denied on September 28, 1979. [App. C]. Due to the important questions of constitutional law herein raised which have not previously been resolved by this Court, this petition for writ of certiorari is presented pursuant to Rule 19(1)(b) of this Court.

REASONS FOR GRANTING THE WRIT

The Holding Below That The Petitioners Were Not Denied Due Process Of Law, Fundamental Fairness, And Equal Protection Of The Law, When Through No Fault Of Their Own They Were Denied Access To The Courts For The Purpose Of Obtaining Mitigation Of Their Sentences, Conflicts With Decisions Of The United States Court of Appeals And Presents Constitutional Questions Of Vital And Continuing Importance To The Administration Of The Criminal Justice System.

Florida's rule of criminal procedure providing for the mitigation of previously imposed sentences, only if ruled upon within a prescribed time, operates so unfairly, unequally, and discriminately that it is un-

constitutional. Identically deserving defendants filing identical timely motions to mitigate at precisely the same time with the same judge may receive drastically different treatment. The rule operates in such a way that one defendant, who is fortunate enough to obtain a ruling by the court within the sixty day time limit prescribed by the rule will obtain mitigation, while another, who for any reason beyond his control cannot obtain a timely ruling on his motion, will find the door to the court barred. Such a result is not only unconscionably unjust, but constitutionally intolerable.

Access to all Courts, state and federal, is a Constitutional right guaranteed by the Due Process Clause of the Fourteenth Amendment, and by the Fifth Amendment. *Silver v. Cormier,* 529 F.2d 161 (10th Cir. 1976); *Boling v. National Zinc Co.,* 435 F.Supp. 18 (N.D. Okl. 1976). The right of access to the courts is a fundamental right implicit in the concept of ordered liberty. e.g., *NAACP v. Button,* 371 U.S. 415 (1963).

The petitioners here have been completely denied access to the courts. They have been deprived of a fundamental constitutional right. They have also been treated unequally and unfairly.

The petitioners have never claimed that they have a federal constitutional right to either have their sentences reduced or to have their motions to mitigate ruled upon. The petitioners do claim, however, that if the state does promulgate a rule providing for access to

the courts for the purpose of seeking mitigation, that that access must be provided equally for all and administered in compliance with the due process requirement of fundamental fairness if that rule is to pass constitutional scrutiny. Such is clearly the established law.

Once a state establishes an avenue of relief, that avenue "must be kept free of unreasoned distinctions". *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966). Precisely the same rule has been established with regard to state provisions for appellate review by convicted defendants:

> While "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," . . . "that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants . . ."
>
> *Griffin v. People of the State of Illinois,* 351 U.S. 12, 18 (1956).

The petitioners here, through no fault of their own, have suffered a severe penalty because of the incidental effect of a rotational system whereby civil and criminal judges are periodically exchanged, thereby rendering the original trial judge unavailable to rule on the motion, coupled with the replacement judge's need to read the trial transcript, and the innocent and unforeseeable misplacement of the petitioners' pre-sentence investigations, which were essential to an intelligent and reasoned determination of this case. [App. A, p. 3a-4a].

Because the delay of the trial court in ruling on the petitioners' motions to mitigate was due solely to unavoidable circumstances over which the petitioners had no control, they should not have been denied a forum in which to demonstrate their rehabilitation and obtain reconsideration of their sentences, due to an absurd, unfair, and unconstitutional construction of the rule. Where, as here, one petitioner gains access to the courts, and another petitioner does not, solely by virtue of circumstances over which he has no control, then the Federal Constitution is seriously offended. A petitioner who finds the courtroom door so barred is at least denied procedural due process, equal protection of the law, and access to the courts, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

The Federal courts have, in fact, consistently recognized the infirmity that such a disparate accessibility to the courts suffers. In *United States v. Mendoza,* 565 F.2d 1285 (5th Cir. 1978), the court rejected a literal reading of the federal mitigation rule and held:

> when a Rule 35 motion is filed sufficiently early in the 120 day period to provide a reasonable opportunity for the courts to consider and rule upon the motion within 120 days, the failure or inability of the trial judge to act on the motion within that period does not divest the trial judge of jurisdiction. Jurisdiction is

> retained for so long as the judge reasonably needs time to consider and act upon the motion.
>
> [565 F.2d at 1287].

The court rejected the express 120 day limitation imposed by Rule 35, Fed.R.Crim.P., as well as the Government's argument that the time prescribed by the rule was jurisdictional, and stated:

> The Rules are not, and were not intended to be, a rigid code with an inflexible meaning irrespective of the circumstances. *Fallen v. United States,* 378 U.S. 139, 142 (1964).

The court relied on Federal Rule 2, which is substantially the same as Fla.R.Crim.P. 3.020, which reads:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure and fairness in administration.

Reasoning that Rule 35 represents an attempt to ensure that every defendant has sufficient time to submit his motion and that every motion is fairly considered and decided, the court concluded that it

> "need not, indeed must not, slavishly follow the literal language of the rule when that

language leads us through the looking glass to an unjust and unreasonable result."

* * *

Likewise we should not follow the literal reading of Rule 35 . . . when the consequences would be so devastatingly and arbitrarily fortuitous.

[565 F.2d at 1289-1290].

As the court emphasized, a defendant might well believe himself to be in wonderland if, having timely filed his motion, he must simply hope that the court will not have temporarily misplaced the records of his case, or be involved in a lengthy trial, or be ill, or on vacation, or delayed by any of countless other legitimate causes, so that his motion will simply fail by attrition, through no fault of his or his counsel. Those defendants who are fortunate enough to file their motions when the Court is in a position to rule promptly will have their cause heard; those less fortunate will find the door of the Court barred. This can be neither fair nor just.

In conclusion, the court held that when, as in this case, "delay flows from the incapacity, absence, or preoccupation of the trial judge, its consequences should not be visited upon the defendant". [565 F.2d at 1290].

The court went on to specify a point in time midway in the time period allowed by the rule, by which a defendant must file his motion in order to ensure a

jurisdictional extension beyond the period of the rule. On rehearing *en banc*, the court rejected the cut off date established by the panel opinion, and held that a motion timely filed at any time during the period specified by Rule 35 is sufficient to confer jurisdiction on the District Court to cons der and rule upon the motion after expiration of the period.

The Fifth Circuit is not alone. Every other Circuit Court which has examined Rule 35 under similar circumstances has concluded that when a motion is filed within the time prescribed by the rule, jurisdiction extends beyond that time in order to allow the trial judge a reasonable time to act on the motion. *Dodge v. Bennett*, 335 F.2d 657 (1st Cir. 1964); *United States v. Janiec*, 505 F.2d 983 (3rd Cir. 1974); *United States v. Stollings*, 516 F.2d 1287 (4th Cir. 1975); *Leyvas v. United States*, 371 F.2d 714 (9th Cir. 1967); *United States v. United States District Court*, 509 F.2d 1352 (9th Cir. 1975); *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974); *United States v. Ourso*, 417 F.Supp. 113 (E.D. La. 1976).

The construction of Florida's mitigation rule adopted by the appellate courts of Florida and left intact by the panel decision of the Circuit court below, encourages not only the injustice that resulted in this case, but forces a trial court to rule upon a timely filed motion for mitigation within what may be an unreasonably short time, out of deference to expediency rather than reason. Because the trial court in this case refused to base its ruling affecting the liberty of the petitioners in

ignorance, and sought instead to make a reasoned and intelligent decision after review of the trial transcript and pre-sentence investigations to which it had previously not had access, it could not rule on the petitioners' motions to mitigate within the prescribed period. By visiting the penalty for that delay upon the petitioners, the court below has endorsed a Constitutionally impermissible result which denied the petitioners procedural due process, equal protection of the law, and access to the courts, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Since Florida provides for mitigation of sentences, access to the courts for the purpose of seeking that relief must be provided equally for all and administered in such a way as to be fundamentally fair. Because Florida neither grants access equally nor in a manner that is less than absurdly unfair, the petitioners pray this Court will issue its Writ of Certiorari.

Respectfully submitted,

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GEOFFREY C. FLECK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing were this ____ day of November, 1979, mailed to the Office of the Attorney General, 401 N.W. Second Avenue, Room 820, Miami, Florida, 33128.

GEOFFREY C. FLECK

APPENDIX "A"

Anibal SOTTO,
Petitioner-Appellee,

versus

Louie L. WAINWRIGHT,
Secretary, Department of Corrections,
Respondent-Appellant.

Joaquin A. AMOR,
Petitioner-Appellee,

versus

Louie L. WAINWRIGHT,
Secretary, Department of Corrections,
Respondent-Appellant.

No. 79-1003.

United States Court of Appeals,
Fifth Circuit.

Aug. 22, 1979.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge:

In this habeas corpus action, we must decide the constitutionality as applied of Florida's Rule of Criminal Procedure 3.800(b), which governs the reduction of sentences by the state's trial courts. The district court, adopting the report of a United States magistrate, held that strict application of the rule had denied petitioners "fundamental due process" and accordingly granted relief. However, we conclude that the rule's application in this case did not violate the Constitution and therefore reverse.

I. Background

On March 25, 1975, in the Circuit Court (trial court) for Dade County, Florida, petitioners Anibal Sotto and Joaquin Amor were convicted of aiding or assisting in conducting a lottery, possession of lottery tickets and possession of lottery paraphernalia and sentenced to three years in prison. After Florida's Third District Court of Appeal affirmed the convictions, *Soto v. State,* 325 So.2d 414 (Dist.Ct.App., 1976), Sotto and Amor petitioned the Florida Supreme Court for writs of certiorari; the court denied the petition on July 30, 1976. *Sotto v. State,* 336 So.2d 1184 (Fla., 1976).

Pursuant to Fla.R.Crim.P. 3.800(b), on September 23, 1976 petitioners filed in the trial court a motion to

mitigate their sentences. Under the version of Rule 3.800(b) then in force,

> A court may reduce a legal sentence imposed by it at the same term of court at which it has been imposed, or if such term ends less than sixty days after the imposition of the sentence, then within sixty days after such imposition, or within sixty days after receipt by the court of a mandate issued by the appellate court upon affirmance of the judgment and/or sentence upon an original appeal, or within sixty days after receipt by the court of a certified copy of an order of the appellate court dismissing an original appeal from the judgment and/or sentence, or, if further appellate review is sought in a higher court or in successively higher courts, then within sixty days after the highest state or federal court to which a timely appeal has been taken under authority of law, or in which a petition for certiorari has been timely filed under authority of law, has entered an order of affirmance, or an order dismissing the appeal and/or denying certiorari.[1]

The court scheduled a hearing on the motion to reduce sentences for September 29, 1976. Judge George Orr, who had presided over petitioners' trial, had since been

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1 Rule 3.800(b) was amended, effective July 1, 1977, to provide as follows:

A court may reduce a legal sentence imposed by it within sixty days after such imposition, or within sixty days after receipt by the

transferred to another division of the court, with Judge Paul Baker assuming his caseload, and a question arose at the hearing as to which judge should rule on the motion. The Chief Judge of the Dade County Circuit Court determined that Judge Baker should handle the matter and directed him to review the case file, trial testimony and presentence investigation report. Judge Baker ordered delivery of the case file and presentence report and rescheduled the hearing for November 22, 1976. On that date, the presentence report had still not been provided; the judge instructed counsel to supply a trial transcript and postponed the hearing until November 24. Neither the report nor the transcript was delivered by that date, however, so the judge reset the hearing for December 7. After reviewing the trial transcript and presentence investigation report, the court conducted the hearing on December 7 and granted petitioners' motion to reduce sentence. Thus,

court of a mandate issued by the appellate court upon affirmance of the judgment and/or sentence upon an original appeal, or within sixty days after receipt by the court of a certified copy of an order of the appellate court dismissing an original appeal from the judgment and/or sentence, or, if further appellate review is sought in a higher court or in successively higher courts, then within sixty days after the highest state or federal court to which a timely appeal has been taken under authority of law, or in which a petition for certiorari has been timely filed under authority of law, has entered an order of affirmance or an order dismissing the appeal and/or denying certiorari.

This section of the rule shall not, however, be applicable to those cases in which the death sentence is imposed or those cases where the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion. The Committee Note explains that "[t]his amendment provides a uniform time within which a defendant may seek a reduction in sentence and excludes death and minimum mandatory sentences from its operation."

the court's decision came long after the expiration of sixty days from the denial of certiorari by the Florida Supreme Court. The judge vacated Sotto's three-year prison sentence, placing him on five years' probation and ordering payment of a $5,000 fine, and also vacated Amor's prison term, sentencing him to one year in the County Jail and requiring payment of a $3,500 fine.[2]

The State of Florida, through its official custodian, respondent Wainwright, petitioned Florida's Third District Court of Appeal for a writ of certiorari, contending that under Rule 3.800(b) the trial court lacked jurisdiction to rule on petitioners' motion to reduce sentence, because more than sixty days had passed since the Florida Supreme Court's denial of certiorari on direct review before the trial court entered its order reducing the sentences of petitioners. The District Court of Appeal granted the writ and agreed that Rule

2 The trial judge was "not unmindful" of Florida state court decisions holding that a court loses jurisdiction if it fails to rule on a motion to mitigate within the sixty-day period. However, he asserted that "the circumstances in the instant case differ inasmuch as the pre-sentence investigation had been misplaced and the trial transcript had to be obtained from the District Court of Appeal and then reviewed before the Court could make an intelligent ruling. The state argues that regardless of the delay or what may have caused it the Court lost jurisdiction to consider the motion to mitigate on December 7, 1976. This Court reasoned that the defendants should not be prejudiced because of a delay over which they had no control. It was not the fault of the defendants that the pre-sentence investigation was misplaced nor was it their fault that the Court had to consider a lengthy transcript. Prior to ruling, the Court considered these exceptional circumstances and proceeded to hear argument on the motion to mitigate."

3.800(b) allowed a trial court to reduce a legal sentence only "within sixty days after the imposition of sentence or within sixty days after the highest state or federal court, to which a timely appeal or petition for writ of certiorari has been taken, has entered an order of affirmance, an order dismissing the appeal or an order denying certiorari." Citing a long line of consistent Florida state court decisions, the court said that "[t]he law is clear that a trial court . . . lacks the jurisdiction to mitigate a legal sentence after the above sixty day periods have elapsed" and observed that "[s]ince this is a jurisdictional matter, we must of necessity reject the defendants' contentions which seek to excuse the trial court's delay in mitigating the sentences." The District Court of Appeal therefore quashed the trial court's mitigation order and reinstated the original three-year prison terms. *State v. Sotto,* 348 So.2d 1222, 1223-24 (Dist.Ct.App., 1977). The Court of Appeal rejected Sotto and Amor's petition for rehearing and the Florida Supreme Court subsequently denied certiorari, thereby exhausting petitioners' state remedies. *Sotto v. State,* 359 So.2d 1219 (Fla., 1978).

On August 16, 1978, Sotto and Amor filed in the United States District Court for the Southern District of Florida the habeas corpus petition involved in this appeal. They alleged that Florida R.Crim.P. 3.800(b) as applied had "worked an intolerable injustice upon the petitioners in this case," violating their rights to equal protection and counsel, inflicting cruel and unusual punishment and denying them both procedural and substantive due process.

A United States magistrate entered a report on November 3, 1978, recommending that the district court afford petitioners relief. The magistrate relied primarily upon our recent decision in *United States v. Mendoza,* 5 Cir., 1978, 565 F.2d 1285, modified on rehearing en banc, 581 F.2d 89, interpreting Fed.R.Crim.P. 35, the federal counterpart to Florida's Rule 3.800(b), to conclude that petitioners had been denied "fundamental due process." Calling it "neither fair nor just" that "defendants who are fortunate enough to file their motions when the Court is in a position to rule promptly will have their cause heard," while "those less fortunate will find the door of the Court barred," he urged the district court to allow the Florida trial court "a reasonable time in which to enter its Order upon the petitioners' motion for reduction of sentence, failing which the writ shall issue." In an order dated November 16, the district judge approved the magistrate's report and directed the Florida trial court to "enter its order upon the petitioners' motions for reduction of sentence on or before December 31, 1978, or the petitioners will be discharged."

The state, through its official custodian, appeals the district court's November 16 order.

II. Fla.R.Crim.P. 3.800(b) Does Not Violate the Constitution

A. The Inapplicability of United States v. Mendoza

Though petitioners have challenged the constitutionality of Rule 3.800(b) on a variety of grounds,

they have concentrated on their substantive due process claim, both before the district court and on appeal. In essence, they argue that since "the delay of the trial court in ruling on the petitioners' motions to mitigate was due solely to unavoidable circumstances over which the petitioners had no control,"[3] the United States Constitution compelled the Florida state courts to forego in this case a strict construction of Rule 3.800(b)'s jurisdictional time limit. They contend that the rule must be read to allow a trial court to decide within "a reasonable time" whether to grant a timely filed motion to mitigate and assert that the Florida state court's literal interpretation of the rule "worked a fundamental unfairness upon the petitioners in this case," thereby denying them substantive due process. Petitioners rest this argument almost exclusively upon our decision in *United States v. Mendoza, supra,* interpreting Fed.R.Crim.P. 35, the federal counterpart to Florida's Rule 3.800(b).

The United States magistrate recognized the central importance of petitioners' substantive due process claim, as he discussed notions of fairness and justice

3 Given our holding today, we accept for the sake of argument petitioners' contention that they in no way caused the delay in the trial court's ruling. However, we note that despite well-established Florida precedent under which the trial court would lose its jurisdiction to rule when the sixty-day period expired, petitioners waited fifty-five days to file their motions and then apparently did not protest the assignment of a new judge to the matter, even though this plainly would require significant delay so that he could become familiar with the case. Also, it is not apparent from the record whether petitioners were in any way responsible for the delay in supplying the trial transcript.

and grounded his recommendations to the district court in the concept of "fundamental due process." Like petitioners, the magistrate depended almost entirely upon our *Mendoza* decision to conclude that the strict application of Rule 3.800(b) in this case violated the Constitution. He stated that *Mendoza* had "considered the principles of due process involved in this case" and, though conceding that "the Fifth Circuit was, of course, interpreting a federal rule," declared that "the rationale underlying the *Mendoza* decision is clearly one of fundamental due process."

In our view, this reliance upon *Mendoza* is misplaced, for contrary to the assertions of the magistrate, due process was not the underlying rationale for that decision. Nor did we discuss any constitutional principles in *Mendoza*. Rather, our decision turned upon general precepts of statutory construction and a specific provision of the Federal Rules of Criminal Procedure that sets forth the intended "purpose and construction" of the Rules.

Fed.R.Crim.P. 35 provides in pertinent part that "[t]he court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal." Defendant Mendoza filed his motion to reduce sentence fifty days after we had issued the mandate affirming his conviction. However, "[d]ue to a combination of factors beyond the defendant's control, . . .

the trial court failed to act on the motion within the 120 day period" and the district court then held "that because the 120 day period had expired, it lacked jurisdiction to pass on the defendant's motion." 565 F.2d at 1287.

We began our analysis in *Mendoza* with emphasis upon a well-established principle of statutory interpretation: If strict construction of a statute's language would produce "an absurd, unjust, or unintended result," or " 'merely an unreasonable one' " at odds with the statute's purpose, the provision "must be construed so as to avoid that result." *Id.* at 1288, 1289.[4] We then observed that this rule of construction was "particularly appropriate in interpreting the Federal Rules of Criminal Procedure," since they "were not intended to be . . . a rigid code with an inflexible meaning," and called particular attention to Rule 2, which identifies the desired purpose and construction of the rules. *Id.* at 1289. Rule 2 states that "[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." In light of that principle of statutory interpretation and the statement of purpose contained in Rule 2, we declined "slavishly [to] follow the literal language of [Rule 35] when that language leads . . . to an unjust and unreasonable result." *Id.* at 1289-1290. Instead, we held that a district court retains jurisdiction over timely filed Rule 35 motions to reduce sentence "for a reasonable time after the expiration [of] 120 days in those rare circumstances in which it is unable to decide the motion within the 120 day period." *Id.* at 1293.[5]

4 In light of the Florida state courts' interpretation of Rule 3.800(b), we are foreclosed from construing the provision in the same manner that we interpreted Fed.R.Crim.P. 35.

Thus, we did not base our *Mendoza* decision upon any constitutional principles; not once did we mention the Constitution. Several other circuits have adopted the same construction of Rule 35, *see United States v. Stollings*, 4 Cir., 1975, 516 F.2d 1287; *United States v. United States District Court*, 9 Cir., 1975, 509 F.2d 1352, *cert. denied*, 421 U.S. 962, 95 S.Ct. 1949, 44 L.Ed.2d 448 (1975); *United States v. Janice*, 3 Cir., 1974, 505 F.2d 983, *cert. denied*, 420 U.S. 948, 95 S.Ct. 1332, 43 L.Ed.2d 427 (1975); *United States v. Polizzi*, 9 Cir., 1974, 500 F.2d 856, *cert. denied*, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975); *Leyvas v. United States*, 9 Cir., 1967, 371 F.2d 714; *Dodge v. Bennett*, 1

5 The *Mendoza* panel opinion attempted to "fine tune" Rule 35 by identifying what constituted a "reasonable time" for filing. The panel held that "when a sentence reduction motion is filed on or before the *60th day* after sentencing or affirmance of the conviction on appeal, a district court which fails to rule on the motion within the 120 day period specified in the rule retains jurisdiction to decide the motion for a reasonable time beyond that period." However, the panel also noted that "we do not intend to draw a hard and fast rule and do not foreclose the possibility that in some cases special circumstances might exist which would allow the district court to retain jurisdiction after 120 days to rule on a motion filed after 60 days." 565 F.2d at 1292.

Upon rehearing en banc, we "unanimously agree[d] with the decision that the district court should have retained jurisdiction to pass on the motion for a reasonable time after the 120 day period," but concluded that we should not use our supervisory power to "establish the 60 day rule articulated in the panel opinion" and therefore disavowed that portion of the decision. The en banc court adopted the remainder of the panel opinion. 581 F.2d at 90.

Cir., 1964, 335 F.2d 657, but these decisions also made no reference to matters of constitutional law.

Accordingly, notwithstanding petitioners' assertions and the magistrate's report adopted by the district court, *Mendoza* and the other cases interpreting Rule 35 do not help determine the constitutionality of Rule 3.800(b). "Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state court . . . . [T]hese expressions of policy are not necessarily embodied in the concept of due process." *Fay v. New York*, 332 U.S. 261, 287, 67 S.Ct. 1613, 1627, 91 L.Ed. 2043 (1947) (Jackson, J.).

B. *The Substantive Content of the Due Process Clause*

"It is established beyond question that . . . substantive due process rights are not limited to those liberties specifically enumerated in the Bill of Rights." *St. Ann v. Palisi*, 5 Cir., 1974, 495 F.2d 423, 425. Yet substantive due process has nonetheless "at times been a treacherous field" for the federal courts. *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (Powell, J., plurality opinion). It raises a danger that our decisions will "be based upon the idiosyncracies of a merely personal judgment," *Malinski v. New York*, 324 U.S. 401, 417, 65 S.Ct. 781, 789, 89 L.Ed. 1029 (1945) (Frankfurter, J., concurring), a risk that judges will "determine what is or is not constitutional on the basis

of their own appraisal of what laws are unwise or unnecessary." *Griswold v. Connecticut*, 381 U.S. 479, 512, 85 S.Ct. 1678, 1697, 14 L.Ed.2d 510 (1965) (Black, J., dissenting). When, as here, we consider a claim that a given state law works a denial of substantive due process, we must skirt that danger and remember that a state's "procedure does not run [a]foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) (Cardozo, J.).

The substantive content of the due process clause which goes beyond the specific provisions of the Bill of Rights embodies "a conception of fundamental justice." *Shields v. Beto*, 5 Cir., 1967, 370 F.2d 1003, 1004. *E.g.*, *Hebert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926); *Bute v. Illinois*, 333 U.S. 640, 648, 68 S.Ct. 763, 768, 92 L.Ed. 986 (1948); *Leland v. State of Oregon*, 343 U.S. 790, 799, 73 S.Ct. 1002, 1008, 96 L.Ed. 1302 (1952); *St. Ann v. Palisi*, *supra*, 495 F.2d at 425. It protects against state transgression only those personal immunities that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.); *Roe v. Wade*, 410 U.S. 113, 151, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973), leaving a state "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and

conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts, supra,* 291 U.S. at 105, 54 S.Ct. at 332.

"Fundamental rights," implicit in the concept of ordered liberty, include the right to vote, *e.g., Harper v. Virginia State Board,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); the right of association, *e.g., NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); the right of access to the courts, *e.g., NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and assorted freedoms against state intrusion into family life and intimate personal decisions, *e.g., Moore v. City of East Cleveland, supra* (right of extended family to share household); *Roe v. Wade, supra* (woman's right to decide whether to have abortion); *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (freedom to marry person of another race); *Griswold v. Connecticut, supra* (right to use contraceptives); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (parents' right to send children to private schools); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (parents' right to have children instructed in foreign language).

A state must advance a compelling justification to preserve a law or regulation that breaches any fundamental right. But "[t]he state must prove a compelling reason for a law *only* if it restricts a fundamental right; so long as such a right is not affected a law need only rationally relate to a legitimate government end." *Woods v. Holy Cross Hospital,* 5 Cir., 1979, 591 F.2d 1164, 1176 (emphasis added).

C. *Applying the Constitutional Principles*

Petitioners Sotto and Amor assert, in summary fashion, that the strict application of Rule 3.800(b) in this case violated their fundamental right of access to the courts. They contend that "[w]here, as here, one petitioner gains access to the courts, and another does not, solely by virtue of circumstances over which he has no control, then the Federal Constitution is seriously offended."

We disagree that Florida has abridged petitioners' right of access. At the outset, we note that the Constitution does not require Florida to afford convicted felons an opportunity to have their sentences mitigated. Further, once the state has chosen to establish a mitigation procedure, it is not constitutionally obligated to extend indefinitely the opportunity to seek mitigation. Florida determined instead to provide convicted persons who desire sentence reduction access to its courts for a limited time, by terminating the jurisdiction of its courts to hear and decide motions to mitigate when a statutorily fixed period expires. Sotto and Amor thus enjoyed the same access to Florida's courts as all other persons seeking reduced sentences — a sixty-day period during which the trial court had jurisdiction to rule upon their motions to mitigate.[6]

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6 Viewed another way, petitioners' claim may be that once having properly filed their motion to mitigate, they had a fundamental right to have it ruled upon, even though the court lacked jurisdiction to do so. We find it difficult to conceive of such a right to a ruling or judgment from a court that, by statute and under well-established precedent, lacked jurisdiction to act.

However, as this case illustrates, Florida's mitigation scheme will in another way sometimes treat similarly situated persons differently. A trial court may decide one person's motion, but lose jurisdiction to rule upon that of another, even though both filed within the sixty-day period and the second is in no way responsible for any delay. If Florida's choice of its sentence mitigation system was simply arbitrary and bore no rational relationship to a valid objective of government, we would readily term the procedure "fundamentally unfair" and hold it unconstitutional. But Rule 3.800(b) is a rational means by which Florida can achieve at least three wholly legitimate governmental ends. First, finality of result is in itself a justifiable goal of a criminal justice system and Rule 3.800(b) ensures that upon the expiration of a fixed time period a conviction and sentence will stand as final. Second, because convicted persons cannot prolong this process by repeatedly filing new motions, the rule guards Florida's trial courts against a burdensome increase in their workload. Finally, and most important, the rule guarantees that trial courts will not inadvertently usurp the power of the parole board by making delayed rulings on motions to mitigate based upon prison conduct. The Florida Supreme Court[7] obviously did not want to "permit indefinite supervision by a trial court over all legal sentences it imposes," for as a Florida appeals court observed, "[s]uch supervision does not accord with reason or public policy. Under our tripartite

7 The Florida Supreme Court promulgates the state's rules of criminal procedure.

system of government there must come a time when the judiciary's power to reduce a lawful sentence ends and vests in the executive department." *State v. Evans*, 225 So.2d 548, 550 (Fla.App., 1969).[8]

Another sentence mitigation rule, written or interpreted in a different way, might well serve these same ends without producing results like those of which Sotto and Amor complain.[9] However, the test of constitutionality is not whether there exists, in our view, a more rational or otherwise preferable alternative law. Nor does it matter under the Constitution that if we were Florida judges, we might have promulgated another rule or interpreted this one differently. Because we cannot say that Rule 3.800(b) as applied denied petitioners any fundamental rights and because we think the rule is rationally related to several valid objectives of government, we conclude that it does not violate the due process clause. Accordingly, we hold that the district court erred in granting Sotto and Amor's habeas corpus petition and therefore reverse.

REVERSED AND REMANDED.

8 Sotto and Amor also contend that the application of Rule 3.800(b) in this case denied them equal protection under the Constitution. Our discussion of petitioners' substantive due process claim disposes of this argument as well. No fundamental right has been abridged, petitioners do not belong to any suspect class and the Rule is a rational means by which to obtain several legitimate governmental ends.

9 Petitioners suggest Fed.R.Crim.P. 35, as interpreted in *Mendoza* and elsewhere, as such an alternative. We note, though, the possibility that the Florida Supreme Court did not want the state's courts forced to determine on a case-by-case basis what constitutes a "reasonable time" for filing, a process which would undermine the precision and certainty afforded by the current rule.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 19

No. 79-1003

D.C. Docket Nos. 78-3857-CIV-JLK and
78-3858-CIV-JLK

Anibal SOTTO,
Petitioner-Appellee,

versus

Louie L. WAINWRIGHT,
Secretary, Department of Corrections,
Respondent-Appellant.

Joaquin A. AMOR,
Petitioner-Appellee,

versus

Louie L. WAINWRIGHT,
Secretary, Department of Corrections,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

August 22, 1979

ISSUED AS MANDATE:

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

September 28, 1979

TO ALL PARTIES LISTED BELOW:

NO. 79-1003 — ANIBAL SOTTO v. WAINWRIGHT; JOAQUIN A. AMOR v. WAINWRIGHT

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ SALLY HAYWARD
Deputy Clerk

cc: Mr. Steven R. Jacob
Mr. Geoffrey C. Fleck

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-751

ANIBAL SOTTO
and
JOAQUIN A. AMOR,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

JIM SMITH
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State of Florida

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OPINION BELOW

The decision below is reported as: Sotto v. Wainwright, 601 F.2d 184 (5th Cir. 1979).

JURISDICTION

The petitioner seeks jurisdiction pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

The respondent respectfully rephrases the petitioner's "Questions Presented for Review" as follows:

> WHETHER A PRISONER IS INEQUITABLY DENIED ACCESS TO THE COURTS BY A STATE RULE OF PROCEDURE WHICH REQUIRES A MOTION TO MITIGATE TO BE RULED ON WITHIN A SPECIFIC PERIOD OF TIME WHERE THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO HAVE A MOTION TO MITIGATE RULED ON AND WHERE THE RULE OF PROCEDURE HAS A RATIONAL BASIS?

STATEMENT OF THE CASE

The respondent accepts the petitioner's Statement of the Case as being an accurate account of the proceedings below. The respondent relies on additional facts as set forth in the argument portion of this brief.

ARGUMENT

Rule 3.800(b), Florida Rules of Criminal Procedure, provides for mitigation of an imposed sentence within sixty days after the highest state court has denied certiorari. Although the petitioners timely filed thier motions to mitigate, the mitigation was not granted until the sixty day jurisdictional period had expired. As recognized by the District Court of Appeal of Florida, Third

District's decision in this case:

> A trial court lacks the jurisdiction to mitigate a legal sentence after the above sixty day periods have elapsed or to mitigate a legal sentence by vacating it and placing the defendant on probation. Moss v. State, 330 So.2d 742 (Fla. 1st DCA 1976); State v. Rodriguez, 326 So.2d 245 (Fla. 3d DCA 1976); State v. Brown, 308 So.2d 655 (Fla. 1st DCA 1975); Smith v. State, 289 So.2d 410 (Fla. 4th DCA 1974); Sayer v. State, 267 So.2d 42 (Fla. 4th DCA 1972); Ware v. State, 231 So.2d 872 (Fla. 3d DCA 1970); Jefferson v. State, 320 So.2d 827 (Fla. 4th DCA 1975); State v. Evans, 225 So.2d 548 (Fla. 3d DCA 1969); cert. den., 229 So.2d 261 (Fla. 1969), cert. den., 397 U.S. 1053 (1970).
>
> State v. Sotto, 348 So.2d 1222, 1223 (Fla. 3d DCA 1977).

The petitioners recognize this general rule of law, but claim that it does not apply to situations like this where the motion to mitigate is timely filed, but due to circumstances beyond their control, is

not timely ruled upon. It is clear, however, that a trial court must act on a motion to mitigate within the applicable time period, regardless of when the motion to mitigate is filed. State v. Mancil, 354 So.2d 1258, 1259 (Fla. 2d DCA 1978); Sayer v. State, 267 So.2d 42 (Fla. 4th DCA 1972); State v. Evans, 225 So.2d 548 (Fla. 3d DCA 1969), cert. denied 229 So.2d 261 (Fla. 1969), cert. denied 397 U.S. 1053 (1970). Nevertheless, despite the fact that the state proceedings were in accord with the appropriate state law, the petitioners claim that they have a right to have their motions ruled on and that the right is one of federal Constitutional proportion.

The respondent would argue that a prisoner does not have a constitutional

right to have his sentence mitigated (which includes both the filing and deciding of the motion). To support the argument, the respondent would draw an analogy to a prisoner's right to have his conviction reviewed.

In McKane v. Durston, 153 U.S. 684, (1894), the habeas corpus applicant had been convicted and was in the process of taking a direct appeal from the conviction. He did not file a "certificate of reasonable doubt" which was a prerequisite for a stay of execution of the sentence pending review. He argued, therefore, that he was deprived of the "right" to have bail pending his appeal. The court concluded that the applicant did not have a "right" to bail pending review. The basis of the court's reasoning was that:

> . . . A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review.

An appeal from a judgment of conviction is not a matter of absolute right. Consequently, the right to bail pending review is not one required by fundamental due process.

In a more recent case, Estelle v. Dorrough, 420 U.S. 534 (1975), a habeas corpus applicant argued that he was denied equal protection of the law because his appeal was removed from its docket pursuant to statute. The statute provides for the automatic dismissal of pending appeals by an escaped felon upon escape.

The appeal is to be reinstated if the felon voluntarily surrenders within 10 days of the escape. In Dorrough, the felon did not voluntarily surrender. While the United States District Court denied relief, the United States Court of Appeals for the Fifth Circuit reversed holding that the prisoner was denied equal protection of the law.

While the Court of Appeals recognized that there is no federal constitutional right to state appellate review of state criminal convictions, it rendered the statute invalid for two reasons. First, because the statute provided separate treatment for prisoners under a sentence of life imprisonment or death. Secondly, because the statute applies only to those prisoners whose appeals were pending, not to those who had not yet invoked the appel-

late process.

This Court reversed the Court of Appeals finding that neither of those distinctions violate the Equal Protection Clause. The statute was a valid exercise of state power in that it discouraged the felony of escape, it encouraged voluntary surrender, and it promoted the efficient operation of the appellate system.

Similarly, the state does not have an obligation to an individual who has been convicted of a crime to provide a procedure whereby the sentence may be mitigated. Cf. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, __ U.S. __, 99 S.Ct. 2100 (1979). A convicted criminal has no due process right to have his conviction reviewed, therefore, he has no due process right to have his sentence reviewed.

Should the state decide to confer such a right upon the individual, it may do so in such terms as it deems proper, as long as the limits which circumscribe the right to review serve legitimate governmental goals (discussed infra).

If the state allows a convicted criminal to move the court to mitigate a sentence, the state may require the motion to be ruled upon by the court within a given time frame, without violating any due process rights owed the movant. In other words, a state may allow a prisoner the right to submit a motion without concurrently providing a right to have the motion ruled upon. The Fifth Circuit, in United States v. Mendoza, 565 F.2d 1285 (5th Cir. 1978), modified on rehearing en banc, 581 F.2d 89, decided as a matter of policy to

put the two rights together, but those "rights" fall short of being a federal constitutional mandate. Therefore, the petitioners have no federal constitutional right to have their motions to mitigate ruled upon outside of the 60 day jurisdictional time limit provided by Rule 3.800(b), Florida Rules of Criminal Procedure.

Because the only right the petitioner's have for their motions to mitigate to be ruled upon is the right which is conferred upon them by the state rule of procedure, the question arises as to whether the state rule of procedure has a rational basis. The primary reason for requiring a motion to mitigate to be ruled upon within a jurisdictional time limit was discussed in State v. Evans, 225 So.2d 548 (Fla. 3d DCA 1969), certiorari denied,

229 So.2d 261 (Fla. 1969), certiorari denied, 397 U.S. 1053 (1970):

> The respondent contends and urges us to hold, that if a motion to mitigate sentence is filed within 60 days of the date a sentence is pronounced by a trial court, that court has the power to hold hearings on the motion and act upon it at any time. Cf. Leyvas v. United States, 371 F.2d 714 (9th Cir. 1967). The plain language of § 921.25 and Rule 1.800(b) prohibits us from announcing such a rule. Respondent's construction of the statute and rule would permit indefinite supervision by a trial court over all legal sentences it imposes. Such supervision does not accord with reason or public policy. Under our tripartite system of government there must come a time when the judiciary's power to reduce a lawful sentence ends and vest in the executive department. Cf. Brown v. State, 152 Fla. 853, 13 So.2d 458, 461-462 (1943); Annot. 168 A.L.R. 706, 711 (1947). We think the statute and rule prescribe that time.

State v. Evans, supra, at 550.

The opinion of the Court of Appeals advanced that rationale as being the most important of three separate, legitimate governmental ends which the rule promotes. As discussed, the rule guarantees that trial courts will not usurp the power of the parole board by making delayed rulings on motions to mitigate based upon prison conduct. See Sotto v. Wainwright, 601 F.2d 184, 192 (5th Cir. 1979).

The other two governmental ends which are achieved are finality of result and the avoidance of repeated filing of new motions. While these two goals might be achieved by a sentence mitigation rule written or interpreted in a different manner, the test of constitutionality is not whether a preferable alternative law exists. See Sotto v. Wainwright,

supra, at 192. In any case, the primary purpose of the rule is to prevent the trial judge from usurping the power of the parole board, and that purpose can only be achieved by requiring the motion to be ruled on within a given period of time.

The federal rule is interpreted differently because the federal courts decided not to give as much weight to the potential dangers of inviting trial courts to procrastinate in deciding motions and to usurp the function of parole boards "by holding the motion in abeyance pending examination of the defendant's conduct in prison," United States v. Mendoza, supra, at 1291 in exchange for assuring the defendant that his motion will be ruled on. The federal interpretation is not grounded on constitutional principles, however, so it is not binding on the states.

CONCLUSION

The petitioner does not have a federal constitutional right to have a motion to mitigate ruled on. The only right the petitioner has relating to a motion to mitigate is that which is conferred upon him by a state rule of procedure. Because that rule of procedure has a rational basis and promotes legitimate governmental policies, the rule does not violate substantive due process and the petitioner was not denied equal protection under the laws. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT IN OPPOSITION was furnished by mail to GEOFFREY C. FLECK, Attorney for Petitioners, 500 Security Trust Building, 700 Brickell Avenue, Miami, Florida, 33131, this _____ day of March, 1980.

STEVEN R. JACOB
Assistant Attorney General